

121 FERC ¶ 61,090
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

New York Independent System Operator, Inc.

Docket Nos. ER01-3001-017
ER03-647-010
ER01-3001-018
(Unconsolidated)

ORDER ACCEPTING INFORMATIONAL REPORTS

(Issued October 26, 2007)

1. In this order, the Commission accepts New York Independent System Operator, Inc.'s (NYISO) June 1, 2007 compliance filing, in Docket No. ER01-3001-017, which includes its Summer Compliance Reports on Demand Response Programs and New Generation Projects. The Commission also accepts NYISO's July 18, 2007 filing in Docket Nos. ER03-647-010 and ER01-3001-018¹ as in satisfactory compliance with our May 18, 2007 order.² However, as discussed below, NYISO is directed to provide additional analysis of withholding of installed capacity (ICAP) in the Rest of State region in future reports.

I. Background

2. As described in our May 18, 2007 Order, on May 20, 2003, in Docket No. ER03-647-000, the Commission conditionally accepted a NYISO proposal to establish ICAP Demand Curves for New York State and required NYISO to file annual compliance reports, beginning December 1, 2003. Each annual filing was to contain two reports: one report on the implementation of the ICAP Demand Curve and the other report on

¹ NYISO made the July 18, 2007 filing to replace its July 17, 2007 filing in the same dockets. NYISO states that the July 18, 2007 filing includes no substantive changes to the earlier report. The July 18, 2007 filing only fixes certain formatting errors in the earlier version.

² *New York Independent System Operator, Inc.*, 119 FERC ¶ 61,162 (2007).

withholding behavior under the ICAP Demand Curve.³ In a September 22, 2004 order on NYISO's December 2003 annual filing, the Commission required subsequent annual reports on implementation of the ICAP Demand Curve to include an examination of trends in the amount of capacity purchased and the impact of the ICAP Demand Curve on new investment.⁴ In its 2004 annual filing, NYISO asserted that it was difficult to reach any definite conclusions on the effects of the Demand Curves on new investment given their relatively brief history and the comparatively long lead time to develop new generation. The Commission agreed and in a June 20, 2005 order⁵ directed NYISO to include in its next (2005) report,⁶ either a detailed examination of the impact of the ICAP Demand Curves on new generation or specification of the period of time necessary to begin observing the effects of the Demand Curves on new generation. Further, the June 20 Order directed NYISO to include documentation that supports its conclusions. On January 3, 2006, following an extension of time to do so,⁷ NYISO submitted its 2005 annual compliance filing to comply with the June 20 Order and earlier orders in Docket No. ER03-647. In an order issued October 23, 2006, the Commission accepted NYISO's 2005 compliance filing, but required NYISO to make further annual filings for the next three years (by December 1st of each year), detailing the effectiveness of the NYISO ICAP Demand Curves.⁸ The Commission specifically required NYISO to provide in all such future reports: (1) price and capacity time series data dating back to NYISO's inception; (2) a list of investments in new generation projects in New York (including a description and current status) regardless of the stage of project development; (3) a summary of the analysis of net revenue that it includes in its annual state of the market report (Net Revenue Analysis) for two technologies (a peaking unit and a combined-cycle unit); and (4) information regarding demand response participation in the ICAP market.

³ *New York Independent System Operator, Inc.*, 103 FERC ¶ 61,201, *reh'g denied*, 105 FERC ¶ 61,108 (2003).

⁴ *New York Independent System Operator, Inc.*, 108 FERC ¶ 61,280, at P 10 (2004).

⁵ *New York Independent System Operator, Inc.*, 111 FERC ¶ 61,427 (2005) (June 20 Order).

⁶ *Id.* at 62,771 n.7.

⁷ The filing deadline was extended in a notice issued on December 1, 2005.

⁸ *New York Independent System Operator, Inc.*, 117 FERC ¶ 61,086 (2006) (October 23 Order).

3. In addition, in a series of orders issued in Docket No. ER01-3001 beginning in 2001,⁹ the Commission directed NYISO to submit two semi-annual reports, beginning December 1, 2001: one, a report on NYISO's progress on its demand response programs and the second, a report on the addition of new generation resources in the New York Control Area. By notice issued November 28, 2006, the Commission granted NYISO's request to submit its winter semi-annual reports in Docket No. ER01-3001 and its annual reports in Docket No. ER03-647 (both otherwise due December 1st), by January 15th of each year in combined filings.

4. On January 16, 2007, NYISO submitted its combined 2006 compliance filing that included reports on: (1) its progress in implementing its ICAP Demand Curves; (2) its Demand Side Management Programs; and (3) New Generation Projects in the New York Control Area. However, the 2006 filing, *inter alia*, did not include the information required by the Commission's previous orders in Docket No. ER03-647 along with the additional information required by the October 23 Order. Therefore, on May 18, 2007, the Commission issued an order conditionally accepting the compliance filing.¹⁰ The May 18 Order required NYISO, in a compliance filing (due by July 18, 2007) and in future compliance filings, to 1) expand the tables and graphs of price and capacity data and provide an analysis of the price and capacity data to determine the effectiveness of the ICAP Demand Curves on price stability and capacity; 2) submit a complete Net Revenue Analysis as required by the October 23 Order; 3) provide information regarding withholding and its effect on the ICAP Demand Curves; and 4) submit an analysis of the effectiveness of the ICAP Demand Curves in encouraging new generation projects.

II. Details of the Current Filings

A. June 1, 2007 Filing in Docket No. ER01-3001-017

5. On June 1, 2007, NYISO submitted its Summer Compliance Report on Demand Response Programs in Docket No. ER01-3001-017 containing two informational reports: "NYISO Summer 2007 Report on Demand Response Programs" and "NYISO Summer 2007 Report on New Generation Projects." In its Summer 2007 Report on Demand Response Programs, NYISO stated that for the reliability-based programs (the Emergency Demand Response Program (EDRP) and Special Cases Resources (SCR)) no activations had occurred since August 3, 2006. NYISO reports that since its January

⁹ *New York Independent System Operator, Inc.*, 97 FERC ¶ 61,095 (2001); *New York Independent System Operator, Inc.*, 100 FERC ¶ 61,081 (2002); *New York Independent System Operator, Inc.*, 100 FERC ¶ 61,243 (2002); *New York Independent System Operator, Inc.*, 105 FERC ¶ 61,115 (2003).

¹⁰ *New York Independent System Operator, Inc.*, 119 FERC ¶ 61,162 (2007) (May 18 Order).

2007 report,¹¹ seven new curtailment service providers have registered with the NYISO. The total number of providers as of May 2007 was 44. NYISO indicates that as of mid-May 2007 there were: (1) 808 EDRP customers with 553.27 MW registered; (2) 1,782 SCR customers with 1,257,104 MW registered; and (3) 19 Day-Ahead Demand Response Program (DADRP) customers with 388.7 MW registered. NYISO anticipated that EDRP registration would remain in the 500-600 MW range after new and revised registration information was received in June 2007. NYISO anticipated that the ICAP SCR registration would grow slightly higher in the summer months. NYISO states that DADRP registrations remained the same as in the January 16, 2007 report.

6. Regarding targeted demand response opportunities in New York City, NYISO explains that Consolidated Edison Company of New York, Inc. (Con Edison) asked NYISO to amend its tariff and procedures to offer its EDRP/SCR resources at the load pocket level as well as the Zonal level. NYISO adds that it has developed a plan to offer this capability, is currently working to modify and test changes to the EDRP/SCR notification software, and it is in discussions with Con Edison to develop the necessary modification to the Emergency Operating Procedures. NYISO also states that it filed revised Market Services Tariff language with the Commission that would allow for targeted demand response calls with a requested implementation date of July 1, 2007.¹²

7. NYISO states that, with respect to including demand response in Ancillary Markets, it is actively engaged with market participants to develop a market-based capability to enable demand response resources to participate in the reserves and regulation markets. NYISO also states that the program will facilitate the use of demand response into the real-time markets and real-time management of the grid. In addition, NYISO states that it and its stakeholders are designing the program to represent demand response as a generation asset in the marketplace. It adds that the program is anticipated to pay resources based upon the quality of reserves provided and quality of services delivered, but not to pay for the avoided energy when such resources are called upon to reduce their consumption. NYISO further states that it is working with the reliability organizations to establish acceptable and appropriate criteria to allow for demand response participation in supplying ancillary services.¹³

¹¹ NYISO's January 2007 report on performance data for events in 2006 was addressed in the Commission's May 18 Order.

¹² NYISO's filing was accepted in *New York Independent System Operator, Inc.*, Docket No. ER07-862-000 (July 3, 2007) (unpublished letter order).

¹³ These issues are not before us for decision in this proceeding.

8. In its discussion on SCR minimum performance duration concerns, NYISO explains that its current practice is that if a demand reduction call event lasts for eight hours the Responsible Interface Parties (RIP) typically report only the four highest contiguous load reduction hours to determine each SCR's performance factor. NYISO states that it has initiated discussions to make changes to require performance to be measured over all hours of an event. NYISO anticipated presenting recommended rule modifications for stakeholder consideration in the June/July 2007 timeframe.

9. NYISO's ICAP Market rules require that SCRs demonstrate their ability to reduce load to their committed levels during each capability period. NYISO states that on April 11, 2007, it issued a day ahead advisory for SCR resources using the NYISO Notification Manager; the feedback from resource contacts demonstrated that a substantial portion of the notices were not delivered, or were not delivered within the required time frames. RETX Energy Services, Inc.'s (RETX) (the notification system provider) internal audit identified several technical issues that prevented the notification process from executing properly. Within five days of the test, RETX implemented a number of changes to reduce the possibility of future notification problems. NYISO plans to continue to work with RETX to ensure high reliability in its communications with demand response providers during EDRP/SCR events.

10. NYISO noted that the New York State Department of Environmental Conservation (DEC) has proposed reporting and registration rules for emergency generators participating in the NYISO's demand response programs and that the DEC is revisiting several of the provisions of concern to the NYISO. NYISO stated that it has developed internal procedures to implement the current provisions of the DEC's proposed rules.

11. In its "Summer 2007 Report on New Generation Projects," NYISO submitted a list of 104 Interconnection Request and Transmission Projects for the New York Control Area dated May 8, 2007. The queue position, owner/developer, date of interconnection request, summer electrical output, winter electrical output, type fuel, location, interconnection point, utility, status, last update, studies available, and proposed in-service date are indicated for each project. NYISO reports that proposed generation and transmission projects undergo up to three studies (feasibility, reliability impact, and facilities studies). NYISO states the Facilities Study is performed on a Class Year basis and NYISO updates the interconnection queue on a weekly basis and posts the most recent list on its website.

B. July 18, 2007 Filing in Docket Nos. ER03-647-010 and ER01-3001-018

12. In compliance with the Commission's May 18 Order, NYISO submitted a "Report on Implementation of, and Withholding Under, the New York Installed Capacity Demand Curves." In its report, NYISO states that it believes that the ICAP Demand Curves are

beneficial because they provide price stability and predictability, reduce incentives to withhold capacity, and should provide appropriate price signals to generation developers.

13. With respect to the effectiveness of the Demand Curves on price stability and predictability, NYISO states that capacity prices in 2006 and the first half of 2007 remained stable on a statewide basis and New York City and Long Island prices remained stable partly due to the effects of price caps in New York City and the largely bilateral nature of the Long Island market.¹⁴ NYISO contends that the ICAP Demand Curves induce a direct relationship between prices and the capacity margins in New York. NYISO states that under the prior *de facto* vertical demand curve regime, spot capacity prices fluctuated considerably, even when supply and demand remained constant. NYISO states that the sloped ICAP Demand Curves ensure that any price fluctuations in the ICAP Spot Market Auctions are only a result of changes in supply offers.

14. Indeed, NYISO reports that price stability for spot prices in the NYCA improved considerably after the implementation of the ICAP Demand Curves. Prior to the spot auction for each month, NYISO conducts Capability Period Auctions, which cover every month for either the summer or winter period, and Monthly Auctions, which cover the remaining months within a Capability Period. These markets clear if bids to buy and offers to sell are in equilibrium. NYISO asserts that convergence between Capability Period Auction prices and ICAP Spot Market prices indicate an overall efficiency of market processes. NYISO states that such convergence has improved considerably after the implementation of the ICAP Demand Curves. From the summer of 2001 through the winter of 2002/3, the average difference between the Capability Auction price and the sum of the spot prices was about \$22/kw-6 month in New York City and \$17/kw-6-month in the NYCA. From summer 2003 through the summer of 2006, under the ICAP Demand curves, the average difference declined to about \$3/kw-6-month in New York City and NYCA.

15. With respect to the effect of Demand Curves on capacity committed to New York, NYISO states that since it implemented the ICAP Demand Curves during the 2003 Summer Capability period, the capacity committed to the New York markets has trended upwards for all three New York zones. NYISO attributes the upward trend to such factors as growth of loads and requirements, annual adjustments to the Demand Curves, new in-state capacity, and steady imports from other control areas. NYISO concludes that the amount of capacity continues to keep pace with or exceeds the increasing capacity requirements in the New York zones. In support, NYISO states that when

¹⁴ NYISO provides market clearing prices and auction activity levels from November 1999 through July 2007 for the New York Control Area (NYCA), New York City and Long Island in Appendix A and Figures 1, 2, and 3 of the report.

compared with the minimum capacity requirements, the average percent excess capacity sold on a statewide basis has increased from 5.5 percent in the 2003 Summer Capability Period to 10.3 percent in the 2006 Summer Capability Period. The report also indicates that the Winter Capability Periods showed similar excess capacity sold ranging from 8.4 percent in the 2003/2004 Winter Capability Period to 8.9 percent in the 2006/2007 with greater excesses in the intervening Winter Capability Periods.

16. NYISO contends that the ICAP Demand Curves provide market-driven compensation for capacity above minimum capacity requirement and reduce incentives for withholding. NYISO reports that: (1) in the overall NYCA market, the quantity of unsold capacity does not exceed a few percent of available supplies; and (2) capacity offered and purchased throughout the state has consistently exceeded the minimum capacity requirements and prices have been below the costs of entry reflected on the ICAP Demand Curves.¹⁵

17. Regarding possible withholding, NYISO concludes that the performance of the ICAP market does not raise concerns about significant physical withholding in the overall NYCA market or on Long Island; however, NYISO has observed certain bidding behavior in New York City that has kept prices at the Commission-approved caps for certain owners of generation divested by Con Edison before the NYISO was formed.¹⁶ NYISO says the observed bidding behavior in New York City is expected under the Commission-approved mitigation measures. By continually offering its capacity at the prescribed bid-cap, NYISO maintains that a Divested Generation Owner (DGO) can ensure that prices for New York City capacity remain at a level that reflects the caps. NYISO also notes that there has been a rise in the quantity of New York City capacity that was offered but unsold. This can be attributed, according to NYISO, to the introduction of 1,000 MW of new generation capacity in New York City and the offering behavior of market participants. However, NYISO states that there was a decline in the relative amount of unsold capacity during the first three months of the Summer 2007 capability period.

18. NYISO states that in order to determine whether any significant economic withholding occurred, it analyzed qualified available capacity not sold, and unsold capacity as a percentage of available capacity. NYISO asserts that examining the MWs of capacity offered but not sold – as distinct from MWs not offered at all – provides a threshold measure of whether economic withholding may have occurred. Long Island

¹⁵ NYISO's analysis is based on data from November 2005 through July 2007.

¹⁶ In the New York City zone, the majority of capacity is subject to Commission-approved ICAP market mitigation measures that include bid caps that are specific to each divested generation owner (owners of capacity divested from Con Edison).

units face a 99 percent locational requirement coupled with the rights to virtually all of the existing capacity on the Island having been secured by contract results in an implied offering requirement. With one exception, Long Island has experienced little to no unsold capacity during the past two years. For the entire NYCA, both the developments in New York City and the growing variability of imports contributed to fluctuations in unsold capacity when measured as a percentage of available capacity. In Summer Capability Periods, almost every resource in Rest of State was offered in the ICAP auctions and sold. NYISO states that Rest of State capacity levels offered and sold under the NYCA demand curve, and the levels of unsold capacity, were generally a small percentage of the total levels.

19. In response to the Commission's request for information regarding the effects of the ICAP Demand Curves on investment in new generation in New York, NYISO states that New York has had capacity available in excess of the minimum requirements to maintain reliability. However, the behavior of key market variables suggests that the system is geared to providing the signals necessary to provide appropriate incentives to investment in new generation. To consider this issue, NYISO's Reliability Needs Assessment (RNA) process has identified future capacity needs and NYISO has solicited and received market-based proposals to address those needs. NYISO and its stakeholders are currently in the process of updating the ICAP demand curves, which will influence developers' anticipated future revenues. NYISO states that because of the lead time required for the development of new generation it is still somewhat difficult to relate the development of new generation to the ICAP Demand Curves.

20. NYISO explains that generally, the amount of generation in its Interconnection Queue has increased since the inception of the ICAP Demand Curves in June 2003. NYISO states that the majority of this new capacity is associated with new wind generation projects in the Rest of State zone, likely the result of a combination of factors, including legislative, policy, and tax measures. NYISO notes that if constructed, these projects will likely participate in the ICAP markets as ICAP suppliers. NYISO states that the number of megawatts associated with projects based on non-wind technologies did not increase significantly until the summer of 2005, partially the result of the withdrawal of certain projects from the interconnection queue during this time period.

21. According to a draft report issued on June 29, 2007, the NYISO has received market-based proposals that are sufficient to meet the needs identified in the 2007 RNA. Developers included 2,790 MWs in projects to either build new generation in New York or enable the import of external resources into the state. NYISO identifies eight projects that appeared to be viable at the time of the report and states there is evidence other developers are pursuing projects in New York.

22. In response to the Commission's directive to provide a net revenue analysis to assess whether revenue from all sources is adequate in regions where capacity is needed,

NYISO states that, in general, there is a tendency for revenues to increase as the excess capacity margin decreases, and vice versa. NYISO examined the level of need for capacity by looking at the percentage of capacity in excess of the applicable minimum requirement. Next, NYISO looked at possible revenues from the capacity and energy markets for a hypothetical combustion turbine. NYISO states that while revenue margins for the hypothetical unit have been rising steadily since 2004, revenues remain well below levels necessary to attract new entry of a hypothetical benchmark gas-fueled simple-cycle, combustion turbine in the Rest of State zone. Through 2005 both New York City and Long Island were experiencing revenue values below their cost of new entry; however, revenues for the hypothetical units have been approaching adequacy in New York City and Long Island (the latter experiencing above cost of new entry values in 2006). NYISO also states that not counting new wind projects, low capacity margins and growing revenues in both the overall and capacity markets in the NYCA are positively correlated with the increased MWs in the interconnection queue.

23. NYISO's independent market advisor concurs with the conclusions in the report. According to NYISO, the independent market advisor believes that the stability provided by the ICAP Demand Curves facilitates the forward contracting for both capacity and energy that is needed to support investment in new and existing generation.

III. Notice

24. Notice of the June 1, 2007 filing in Docket No. ER01-3001-017 was published in the *Federal Register*, 72 Fed. Reg. 33,998 with comments or protests due on or before June 22, 2007. No comments were filed. Notice of the July 18, 2007 filing in Docket Nos. ER03-647-010 and ER01-3001-018 was published in the *Federal Register*, 72 Fed. Reg. 41,728 with comments or protests due on or before August 8, 2007.

25. Timely motions to intervene and comments were filed by the New York Transmission Owners (NYTOs),¹⁷ the City of New York (City); and Con Edison. Comments were filed by the Multiple Intervenors.¹⁸ On August 14, 2007, Astoria Generating Company, L.P. (Astoria) filed a motion to intervene out of time and an answer to the comments. On September 7, 2007, NYISO filed an answer to the

¹⁷ The NYTOs are comprised of: Central Hudson Gas & Electric Corporation; LIPA; New York Power Authority; New York State Electric & Gas Corporation; Niagara Mohawk Power Corporation d/b/a National Grid; and Rochester Gas and Electric Corporation.

¹⁸ Multiple Intervenors is an unincorporated association of about 50 large industrial, commercial, and institutional energy consumers with manufacturing and other facilities located in New York State.

comments. Notice of NYISO's September 7, 2007 answer was published in the *Federal Register*, 72 Fed. Reg. 53,551 with comments or protests due on or before September 28, 2007. Multiple Intervenors and the NYTOs filed timely comments to NYISO's September 7, 2007 answer. The comments and answers are discussed below.

IV. Discussion

A. Procedural Matters

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), notices of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

27. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2007), the Commission will grant Astoria's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

28. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits answers to protests unless otherwise ordered by the decisional authority. We will accept NYISO's and Astoria's answers because they have provided information that assisted us in our decision-making process.

B. Informational Reports

29. The Commission finds that NYISO has complied with the informational reporting directives contained in both the ER03-647 and ER01-3001 dockets, including those specified in the Commission's May 18, 2007 Order, as explained further below.

1. Withholding in Rest of State

a. NYTOs' August 8, 2007 Comments

30. The NYTOs claim that the July 18, 2007 report fails to comply with the May 18 Order because it does not include an analysis of withholding of ICAP in the Rest of State region. The NYTOs maintain that the Commission agreed with the NYTOs in the May 18 Order that NYISO should include such an analysis in its current filing and in future reports. As such, the NYTOs request that the Commission require NYISO to provide a complete analysis of whether physical or economic withholding has affected New York's ICAP markets, including the Rest of State region.

31. Further, the NYTOs assert that NYISO's reasons for ignoring the Rest of State withholding reflect a misunderstanding of the incentives that are conducive to the exercise of market power. First, the NYTOs state that NYISO is mistaken in stating that

there is no need for concern with the potential exercise of market power in the ICAP NYCA market as a whole because the amount of ICAP sold in the NYCA has exceeded minimum installed capacity requirements and the prices for ICAP in the Rest of State region have been lower than the cost of entry reflected in the ICAP demand curve for the NYCA. The NYTOs argue that lower capacity prices translate to lower costs of withholding for suppliers and therefore greater incentive to withhold capacity.

32. Second, the NYTOs claim that NYISO is incorrect in stating that since the amount of unsold capacity was just a few percent of the amount of ICAP, withholding of such an amount of capacity could not have significant impact on market prices. The NYTOs claim that withholding just a small percentage of the total minimum ICAP requirement can have a significant impact on price. For example, NYTO states that if (after considering the effect of unsold capacity in New York City) all of the unsold capacity in the Rest of State and Long Island (i.e., 802 MW) had been offered into the July 2006 auction, the Rest of State price would have decreased by \$1.47/kW-mo. (This compares with a net cost of new entry of \$7.50/kW-mo., which is the price that would result if supply cleared at exactly 100 percent of the minimum requirement.)

b. NYISO's Answer

33. In its answer, NYISO states that the NYTOs do not suggest that using a vertical demand curve is preferable to the current sloped ICAP Demand Curves for reducing incentives to exercise market power. Further, NYISO states that the NYTOs do not offer any support for a conclusion that any Rest of State capacity that went unsold was the result of a market participant with market power in the Rest of State withholding capacity for the purpose of artificially raising auction prices.

34. NYISO states that unsold capacity, by itself, does not necessarily indicate that a market participant has engaged in withholding in an effort to increase auction prices. NYISO states that the amount of unsold capacity in the Rest of State region is relatively small compared to the quantity of capacity in the NYCA as a whole. NYISO also points out that there is no bid cap or must-offer requirement for any capacity in Rest of State New York.

c. NYTOs' September 28, 2007 Comments

35. In their September 28, 2007 comments, the NYTOs reiterate their earlier argument that NYISO has not complied with the Commission May 18 Order because NYISO did not address economic withholding in the NYCA-wide ICAP market. The NYTOs argue that NYISO ignores the real issue of whether withholding may have had a significant impact on ICAP prices.

d. Commission Determination

36. The Commission will accept NYISO's analysis of possible physical or economic withholding in the NYCA area, as directed by the May 18 Order.

37. However, we agree that NYISO's analysis of possible withholding in the Rest of State region is incomplete. Both the NYTOs and NYISO agree that some capacity went unsold in the Rest of State. NYISO did not provide evidence or analysis to determine how much, if any, of this unsold capacity was economically or physically withheld with the intention of increasing prices. The NYTOs calculate that the total unsold capacity outside of New York City was 802 MW in the July auction, and estimate that if all of this unsold capacity had been sold into the July auction, the price in the Rest of State would have been \$1.47/kW-mo lower. The NYTO's calculation represents their estimate of the effect of potential withholding on the Rest of State capacity price, and it may provide an upper bound to the price effect of withholding. (If some or all of this capacity was unsold for legitimate reasons, rather than an exercise of market power, the price effect due to withholding would be smaller than \$1.47/kW-mo.) While the NYTOs raise an important issue, we will not require NYISO to revise its July 18 report. However, in the report due in January 2008 and in future reports, NYISO must provide a complete analysis of withholding (including an analysis of bidding behavior) in the Rest of State region, (as well as in the other regions of New York State).¹⁹ To the extent that NYISO is able to estimate the amount of unsold capacity that reflects withholding, it should present that estimate and its likely effects on capacity prices. To the extent that NYISO is unable to determine the amount of unsold capacity that reflects withholding, it should include an analysis similar to that provided in NYTOs' comments to estimate the upper bound of the effect of withholding on capacity prices.

¹⁹ We agree with NYISO that withholding is less likely to occur when: (1) the amount of unsold capacity in the Rest of State does not exceed a few percent of available supplies; (2) capacity purchased has consistently exceeded the minimum requirements; and (3) prices have been below the costs of entry. Nevertheless, in the report due in January 2008 and in future reports, NYISO's analysis of bidding behavior in the Rest of State should include, for capacity offers that were not accepted, an examination of how many (if any) of the offers significantly exceeded a reasonable estimate of their going forward costs.

2. Analysis of New Generation Projects

a. Multiple Intervenors' August 8, 2007 Comments

38. Multiple Intervenors argue that NYISO has failed to produce the analysis that demonstrates that the Demand Curve has effectively encouraged the development of new generation in New York State. Multiple Intervenors claim that NYISO, in providing a list of new generation projects, has not provided an explanation of whether or how the Demand Curves are responsible for these projects. Multiple Intervenors also point out that other incentives, such as tax incentives and legislative policy measures, are more likely the impetus for some projects. Multiple Intervenors argue that the Commission should require NYISO to provide a detailed analysis that demonstrates that the Demand Curves have been effective in encouraging new generation in New York, and in the absence of such a showing by NYISO, the Commission should conclude that the Demand Curves have been ineffective in attracting new generation.

b. NYISO's Answer

39. NYISO notes in its Answer that the Multiple Intervenors' request is a *de facto* endorsement of a vertical demand curve. NYISO explains that the ICAP Demand Curves are sloped and so recognize that capacity in excess of the minimum requirement has value, a characteristic not found in a vertical demand curve. Further, NYISO points out that the sloped Demand Curves ensure that market prices rise toward the cost of new entry as the amount of available capacity approaches the minimum requirement.

c. Multiple Intervenors' September 27, 2007 Comments

40. In their September 27, 2007 comments, Multiple Intervenors generally reiterate their position that the Commission should order NYISO to file a detailed submission that demonstrates conclusively that the Demand Curves have in fact effectively encouraged new generation in New York. The Multiple Intervenors contend that NYISO mischaracterizes the relief sought by Multiple Intervenors as Multiple Intervenors neither stated that vertical Demand Curves better attracted developers of new generation, nor did it recommend that the Commission replace the sloped curves with vertical curves. The Multiple Intervenors also contend that NYISO's assertion that the Demand Curves provide capacity pricing benchmark for parties entering into bilateral contracts is unsupported by specific facts or evidence.

d. Commission Determination

41. The Commission will accept NYISO's analysis of new generation projects in the NYCA. NYISO has provided a complete, legible list of projects and has provided a reasonable analysis of the incentives that have spawned these projects. The Commission

agrees with NYISO that it is still premature to judge the effect of the Demand Curves on creating incentive for new generation projects, despite the positive data contained in NYISO's July 18, 2007 report. So far, market conditions have not been conducive to achieving a true understanding of the signaling effect of the Demand Curves on new generation. As NYISO points out in the July 18, 2007 report, New York has had excess capacity in the years in which the Demand Curves have been in place. Until the excess capacity conditions do not hold, or until there is a forecasted end to the excess capacity conditions, it may not be possible to fully evaluate the effect of the Demand Curves on new generation.

3. Capacity Pricing

a. The City's Comments

42. The City states that NYISO offered a benign explanation for the fact that capacity clearing prices actually rose in New York City in the face of the addition of new in-City generation in 2006. The City explains that NYISO's acknowledgment of economic withholding that is consistent with Commission expectations was not supported by recent Commission pronouncements. The City claims that with bidding behavior that reflects economic withholding to artificially raise in-City capacity prices, it is not sufficient to offer an innocuous description of capacity bidders' behavior in the context of a Report on Demand Curve implementation. The City states that in fact, the recent bidding patterns in New York City's Zone J have also put upward pressure on capacity prices in the Rest of State – a direct result of the Demand Curve.

43. The City explains that NYISO's attachment reflects that 9.5 percent of the available Zone J UCAP went unsold in winter 2006-2007 and only slightly smaller amounts were economically withheld in other NYISO capacity auctions over the past year. The City argues that this pattern was not seen in earlier years when New York City load and capacity remained in close balance. The City states that clearing prices in all capacity auctions rose in 2006 as compared to the prior year, when in-City capacity resources were markedly lower. Therefore, the City claims that the most logical inference to be drawn from such a persistent bidding pattern is that it has constituted an attempt to forestall the beneficial market effects that would ordinarily flow from the addition of new, highly efficient generation in New York City.

44. The City claims that the benefits that were expected to be associated with the NYISO capacity market Demand Curves have proven to be largely illusory. The City states that in-City UCAP prices have been effectively doubled by the use of economic withholding by capacity bidders. As such, the City argues it is not helpful to the Commission for NYISO to provide an unduly benign account of capacity market distortions that have artificially raised auction clearing prices.

b. Con Edison's Comments

45. Con Edison states that NYISO's ICAP Report acknowledges that certain bidding behavior has kept capacity prices at the Commission-approved price cap for certain DGOs. Con Edison believes that it is important to underscore the adverse effect that such bidding behavior has and may continue to have on New York consumers. Con Edison requests that the Commission complete the review of the New York City capacity market and effectuate appropriate reforms and remedies. Further, Con Edison states that high capacity prices in New York adversely affect electric consumers, which should be an emphasis in the Commission's review of New York's electric markets.

c. Astoria's Answer

46. In its answer, Astoria explains that the City interprets the data in the ICAP Report as indicating there has been economic withholding in the in-City ICAP market. However, Astoria claims that NYISO conducted a fair and balanced assessment and determined that the bids were submitted in accordance with the Commission-approved ICAP market mitigation measures. Astoria contends the Commission should complete its comprehensive assessment of the in-City ICAP market in the respective proceeding in Docket No. EL07-39-000 and refrain from addressing a subset of the issues simultaneously in this proceeding. Astoria claims that the ICAP Report did not reach a conclusion that bidding behavior caused capacity prices to remain high, but rather the Report notes that in-City bids complied with the ICAP market mitigation measures and were consistent with Commission expectations.

d. NYISO's Answer

47. In its answer, NYISO states that the prices for this capacity in the spot auctions are the result of offering behavior under the currently effective mitigation measures. NYISO argues that the issues raised by the City are not relevant to the subject of NYISO's filing as the issues are part of a Commission investigation in a separate docket. Finally, NYISO explains that the other issues raised by the City, such as market power mitigation, are distinct from the ICAP Demand Curves, and thus the City's comments provide no basis for evaluating the performance of sloped as opposed to vertical demand curves.

e. Commission Determination

48. NYISO has provided the information on its Demand Curves in reports as required by the Commission, and we accept the NYISO reports.

49. On December 22, 2006, the NYISO filed proposed revisions to its tariff that sought to modify the current mitigation measures in the in-City ICAP market.²⁰ In comments filed in that proceeding, various parties raised allegations that certain in-City sellers of ICAP engaged in economic withholding, thereby causing capacity prices to be artificially raised in that market.²¹ In light of those allegations, on July 6, 2007, the Commission referred to the Office of Enforcement, for investigation under section 1b.5 of the Commission's regulations, the issue of whether any in-City sellers of ICAP engaged in market manipulation in violation of section 1c.2 of the Commission's regulations.²² Since the issue of economic withholding in the in-City ICAP market, which is raised in the comments of the City and Con Edison in this proceeding, is related to the subject matter of that nonpublic investigation, we will not address that issue here.

The Commission orders:

(A) NYISO's June 1, 2007 and July 18, 2007 compliance filings are accepted as in compliance with the May 18, 2007 Order.

(B) NYISO is directed to provide additional analysis of withholding of installed capacity (ICAP) in the Rest of State region in future reports.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Acting Deputy Secretary.

²⁰ *New York Independent System Operator, Inc.*, Docket No. ER07-360-000 (Dec. 22, 2006).

²¹ *New York Independent System Operator, Inc.*, 120 FERC ¶ 61,024 at P 6 n.8 (2007) (listing the names of the entities that raised such allegations).

²² *Id.* at P 18.